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11 HOME DEPOT U.S.A., INC.

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16
17 B&O MANUFACTURING, INC.,

18 Plaintiff,

19 v.

20 HOME DEPOT U.S.A., INC.,

21 Defendant.

CASE NO. C07 02864 JSW

**HOME DEPOT U.S.A., INC.'S ANSWER,
DEFENSES AND COUNTERCLAIMS TO
PLAINTIFF'S THIRD AMENDED
COMPLAINT**

DEMAND FOR TRIAL BY JURY

22
23
24 **HOME DEPOT U.S.A., INC.'S ANSWER, DEFENSES AND COUNTERCLAIMS TO**
25 **PLAINTIFF'S THIRD AMENDED COMPLAINT**

26 Pursuant to Fed. R. Civ. P. Rules 8, 12 and 13, defendant Home Depot U.S.A., Inc.
27 ("Home Depot") respectfully submits its Answer, Defenses and Counterclaims in response to
28

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1

HOME DEPOT U.S.A., INC.'S ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

1 Plaintiff B&O Manufacturing, Inc.'s ("B&O's") Third Amended Complaint. In response to the
2 numbered allegations of the Third Amended Complaint, Home Depot states as follows:

3 **GENERAL ALLEGATIONS**

4 **1. Plaintiff, B&O Manufacturing, Inc. ("B&O"), is a California corporation, whose**
5 **principal place of business is South San Francisco, California.**

6
7 RESPONSE: Upon information and belief, Home Depot admits the allegations of Paragraph 1
8 of the Third Amended Complaint.

9
10 **2. Defendant, Home Depot, U.S.A., Inc. ("HD"), is a Delaware corporation, whose**
11 **principal place of business is Atlanta, Georgia.**

12
13 RESPONSE: Home Depot admits the allegations of Paragraph 2 of the Third Amended
14 Complaint.

15
16 **JURISDICTION**

17 **3. The Court has jurisdiction of this Complaint, pursuant to 28 USC 1332, as the**
18 **parties are citizens of different states and the amount in controversy exceeds \$75,000.**

19
20 RESPONSE: Home Depot admits that this Court has subject matter jurisdiction over this action.

21
22 **4. Further, pursuant to a contract entered into by B&O and HD on or about April 5,**
23 **2005, the parties agreed that any litigation arising out of said contract, which this lawsuit**
24 **does, shall be brought only in the United States District Court for the Northern District of**
25 **California. A true and correct copy of said contract, sans attachments, is attached as**
26 **Exhibit 1. Plaintiff has not attached said attachments as, inter alia, they contain pricing**
27 **information that B&O believes HD may consider confidential.**

1 **Additionally, Plaintiff sues on another written contract, Exhibit 3(infra), which**
 2 **contains, at Section 17.0, a forum selection clause that purports to establish venue in the**
 3 **United States District Court for the Northern District of Georgia, or the Superior Court of**
 4 **Cobb County, Georgia. Defendant apparently contends, by referencing Exhibit 3 in its**
 5 **Motion to Dismiss Counts Two and Three of Plaintiff's First Amended Complaint, at**
 6 **Memorandum pp. 3:1-3, 8:5-6 and 8 at footnote 6, that the relationship between the**
 7 **parties, pursuant to Exhibits 1 and 2, is affected by the existence of Exhibit 3. Judicial**
 8 **economy, the potential for inconsistent results, and the related case doctrine suggests that**
 9 **all claims for relief arising out of Exhibit 3 be heard on this one action in the Northern**
 10 **District of California.**

11
 12 **RESPONSE:** Home Depot admits that (a) Home Depot and B&O entered into a contract on or
 13 about April 5, 2005; (b) Home Depot and B&O entered into another written contract that
 14 contains a forum selection clause establishing venue in Georgia's courts; and (c) that the claims
 15 and defenses in this action concern both contracts. Home Depot respectfully refers the Court to
 16 the contracts in question for a complete and accurate statement of their terms and denies any
 17 remaining allegations of Paragraph 4 of the Third Amended Complaint.

18 19 **VENUE**

20 **5. Venue is proper in the Northern District of California under 28 USC 1391(a), in that**
 21 **a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in**
 22 **said District.**

23
 24 **RESPONSE:** Home Depot denies the allegations of Paragraph 5 of the Third Amended
 25 Complaint.

FIRST CLAIM FOR RELIEF (BREACH OF CONTRACT)

6. Pursuant to Exhibit 1, Section 1.a, HD agreed to purchase from B&O, not later than May 15, 2005, 72,000 split curtain safety netting systems.

RESPONSE: Home Depot denies the allegations of Paragraph 6 of the Complaint, and respectfully refers the Court to the March 15, 2005 Memorandum of Understanding, complete with all exhibits, for a complete and accurate statement of Home Depot's rights and obligations under the agreement. *See* Counterclaims Exhibit 1.

7. HD has breached said contract by purchasing substantially less than 72,000 split curtain safety netting systems by May 15, 2005, all to Plaintiff's damage, according to proof.

RESPONSE: Home Depot denies the allegations of Paragraph 7 of the Third Amended Complaint.

8. Pursuant to Exhibit 1, section 1.e., HD agreed to purchase all orange netting then owned by B&O at specified prices.

RESPONSE: Home Depot admits the allegation of Paragraph 8 that Home Depot agreed to purchase all orange netting then owned by B&O at specified prices and respectfully refers the Court to the March 15, 2005 Memorandum of Understanding, complete with all exhibits, for a complete and accurate statement of Home Depot's agreement. *See* Counterclaims Exhibit 1.

9. HD has further breached said contract by failing to purchase all orange netting then owned by B&O at specified prices, all to Plaintiff's damage, according to proof.

1
2 RESPONSE: Home Depot denies the allegations of Paragraph 9 of the Third Amended
3 Complaint.
4

5 **10. Pursuant to Exhibit 1, Section 1.c., HD was obligated to advise B&O of the identity**
6 **of suppliers of safety netting products similar to Plaintiff's safety netting products, located**
7 **in the State of California, and of the location of the stores in which said similar products**
8 **were located.**
9

10 RESPONSE: Home Depot denies the allegations of Paragraph 10 of the Third Amended
11 Complaint, and respectfully refers the Court to the March 15, 2005 Memorandum of
12 Understanding, complete with all exhibits, for a complete and accurate statement of Home
13 Depot's rights and obligations under the agreement.
14

15 **11. HD has further breached said contract by failing to so advise B&O, all to Plaintiff's**
16 **damage, according to proof.**
17

18 RESPONSE: Home Depot denies the allegations of Paragraph 11 of the Third Amended
19 Complaint.
20

21 **12. Plaintiff has at all times been in compliance with its material obligations under said**
22 **contract. WHEREFORE, Plaintiff prays judgment as follows:**
23

24 RESPONSE: Home Depot denies the allegations of Paragraph 12 of the Third Amended
25 Complaint and states that Plaintiff is entitled to no relief whatsoever on its Third Amended
26 Complaint.
27

SECOND CLAIM FOR RELIEF (RECISSION AND RESTITUTION)

13. Plaintiff incorporates by reference, as though set forth in full, paragraphs 1 through 7, above.

RESPONSE: Home Depot incorporates by reference its responses to Paragraphs 1-7 as if set forth in full.

14. Until HD recently stopped purchasing from B&O, for approximately the past thirteen years, Defendant has been, cumulatively, by far, Plaintiff's biggest customer. Its continued purchases from Defendant have been critical to Plaintiff's financial success.

RESPONSE: Home Depot lacks the knowledge or information necessary to form a belief as to the truth of the allegations of Paragraph 14 and, on that basis, denies the allegations of Paragraph 14 of the Third Amended Complaint.

15. On or about January 31, 2006, while Michael Calleja, B&O's president, was at HD's facility in Atlanta, Georgia, HD required Mr. Calleja to immediately prepare and sign, on Plaintiff's letterhead, a letter agreement regarding a commitment to pay to HD sums not actually owing to it. A true and correct copy of said letter agreement is attached hereto as Exhibit 2. Said letter agreement served to modify Exhibit 1. As modification to Exhibit 1, the forum selection and choice of law provisions contained in Section 4 of Exhibit 1 are equally applicable to Exhibit 2.

RESPONSE: Home Depot denies the allegations of Paragraph 15 of the Third Amended Complaint, except that Home Depot admits that on or about January 31, 2006 (a) Michael Calleja visited Home Depot's representatives at the Home Depot Store Support Center in Atlanta,

Georgia and (b) B&O and Home Depot entered into the Refund Agreement attached as Exhibit 2 to the Third Amended Complaint and as Counterclaims Exhibit 2.

16. At that meeting B&O was told that if it did not sign Exhibit 2 at that time, HD would not purchase any further netting products from B&O, and instead would purchase said products from Sinco Sala, a competitor of Plaintiff.

RESPONSE: Home Depot denies the allegations of Paragraph 16 of the Third Amended Complaint.

17. Exhibit 2, by virtue of a margin notation, indicates that it was approved by HD's legal department.

RESPONSE: Home Depot admits that the Refund Agreement attached as Exhibit 2 to the Third Amended Complaint bears a notation that indicates it was approved by Home Depot's legal department.

18. Although HD, and its in-house legal department were well aware that B&O was represented by counsel with respect to the negotiation and execution of Exhibit 1 and all payments related thereto based, inter alia, on the participation by B&O's counsel in drafting Exhibit 1, and further, by the fact that B&O's counsel traveled to HD's headquarters in Atlanta, Georgia, for a meeting that ultimately resulted in the execution of Exhibit 1, after extensive negotiations of the terms thereof by counsel for B&O and counsel for HD, B&O was not given the opportunity to review Exhibit 2 with its counsel.

RESPONSE: Home Depot admits that certain Home Depot representatives and members of Home Depot's in-house legal department were aware that Paul Rice, B&O's counsel,

1 (a) participated in discussions concerning the 2005 Memorandum of Understanding and
2 (b) attended a meeting that concerned the 2005 Memorandum of Understanding at Home
3 Depot's Store Support Center in Atlanta, Georgia. Home Depot denies any remaining
4 allegations of Paragraph 18 of the Third Amended Complaint.

5
6 **19. At that time it signed Exhibit 2, B&O had no realistic alternative but to sign Exhibit**
7 **2, as HD's failures to meet its obligations with respect to the 72,000 split curtain safety**
8 **netting system under Exhibit 1, which netting systems are "netting products" as referenced**
9 **in paragraph 16, above, would have resulted in B&O's bankruptcy or financial ruin. HD**
10 **was aware of such at the time it insisted that B&O execute Exhibit 2.**

11
12 RESPONSE: Home Depot denies the allegations of Paragraph 19 of the Third Amended
13 Complaint.

14
15 **20. By virtue of said economic duress and coercion, said contract is voidable, and B&O**
16 **is entitled to a rescission of any contractual obligations that might otherwise exist pursuant**
17 **to Exhibit 2, and to restitution of all amounts paid by it to HD thereunder. Any delay by**
18 **B&O in demanding rescission or restitution was excused by virtue of B&O's continuing**
19 **dependence on HD to avoid its financial ruin or bankruptcy, and its inability to promptly**
20 **demand rescission and restitution without the substantial likelihood of such occurring.**

21
22 RESPONSE: Home Depot denies the allegations of Paragraph 20 of the Third Amended
23 Complaint.

24
25 **WHEREFORE, Plaintiff prays judgment as follows:**

26
27 RESPONSE: Home Depot denies that Plaintiff is entitled to any relief whatsoever on its Third
28

1 Amended Complaint.

2
3 **THIRD CLAIM FOR RELIEF (BREACH OF CONTRACT)**

4 **21. Plaintiff incorporates by reference, as though set forth in full, paragraphs 1 through**
5 **5 above.**

6
7 RESPONSE: Home Depot incorporates by reference its responses to Paragraphs 1-5 as if set
8 forth in full.

9
10 **22. On or about June 6, 2006, B&O and HD entered into a written contract entitled**
11 **“EXPENSE BUYING AGREEMENT-SAFETY NETTING”. A true and correct copy of**
12 **said contract, sans attachments, save and except a small redacted portion thereof, is**
13 **attached hereto as Exhibit 3. Plaintiff has not attached said attachments as, inter alia, they**
14 **contain pricing information that B&O believes HD may consider confidential.**

15
16 RESPONSE: Home Depot admits that B&O and Home Depot entered into a written contract
17 entitled the Expense Buying Agreement—Safety Netting. Home Depot denies the remaining
18 allegations of Paragraph 22 of the Complaint and refers the Court to the full Expense Buying
19 Agreement for a full and complete statement of its terms.

20
21 **23. HD has materially breached said Exhibit 3 by not purchasing from B&O 75% of**
22 **new store netting within the specified time period, all to B&O’s damage, according to**
23 **proof.**

24
25 RESPONSE: Home Depot denies the allegations of Paragraph 23 of the Third Amended
26 Complaint.

27 **24. The pricing set forth in the redacted portion of Exhibit 3, is a discounted pricing**

1 structure, which was negotiated between B&O and HD, based upon the condition and
 2 mutual understanding that HD would meet its contractual minimum purchase
 3 requirements as referenced in Exhibit A-1 to Exhibit 3, above. Due to HD's early
 4 termination, without cause, of new store safety netting purchases prior to purchases by HD
 5 totaling said 75%, B&O is entitled to additional damages based upon a retroactive
 6 modification of the discounted pricing structure provided to HD for all products
 7 referenced in the redacted portion of Exhibit 3, to reflect the non-discounted pricing paid
 8 by HD to B&O prior to the effective date of Exhibit 3.

9
 10 RESPONSE: Home Depot admits that Exhibit 3 speaks for itself and denies the remaining
 11 allegations of Paragraph 24 of the Third Amended Complaint. Notably, the parties' agreement
 12 explicitly allowed Home Depot to "terminate this Agreement without cause, upon sixty (60) days
 13 prior written notice to [B&O]," and provides for none of the remedies alleged in Paragraph 24.
 14 See Exhibit 3, ¶ 3.1(b).

15
 16 **25. Plaintiff has at all times been in compliance with its material obligations under said**
 17 **contract.**

18
 19 RESPONSE: Home Depot denies the allegations of Paragraph 25 of the Third Amended
 20 Complaint.

21
 22 **26. HD has further breached such contract by failing to pay for over \$200,000 of**
 23 **product ordered by HD after it purported to give notice of termination pursuant to Section**
 24 **3.1(b) of Exhibit 3.**

25
 26 RESPONSE: Home Depot denies the allegations of Paragraph 26 of the Third Amended
 27 Complaint.

1
2
3 **27. HD has additionally breached said contract by failing, despite demand by Plaintiff,**
4 **to purchase substantial quantities of completed product, and of component parts necessary**
5 **for the assembly thereof, manufactured and or purchased for the express purpose of B&O**
6 **fulfilling its obligations to HD pursuant to Exhibit 3, entitling Plaintiff to damages not yet**
7 **calculated, including, but not limited to damages available to it pursuant to Commercial**
8 **Code §§ 2708-2710. For the most part, said product and parts are custom made to HD**
9 **requirements, and have not other market, other than as scrap. HD has audited these**
10 **products, subsequent to its purported early termination of Exhibit 3, by physical inspection**
11 **pursuant to its audit rights under Section 27.0 of Exhibit 3.**
12

13 RESPONSE: Home Depot denies the allegations of Paragraph 27 of the Third Amended
14 Complaint.
15

16 **28. Home Depot denies each and every allegation of the Third Amended Complaint not**
17 **specifically admitted above.**
18

19 **DEFENSES**

20 In addition to the foregoing responses to Plaintiff's numbered allegations, Home Depot
21 asserts the following defenses:

22 **FIRST DEFENSE**

23 Plaintiff's claims for breach of contract are barred, in whole or in part, by plaintiff's
24 failure to state a claim upon which relief can be granted.

25 **SECOND DEFENSE**

26 Plaintiff's claims for breach of the 2005 Memorandum of Understanding are barred, in
27 whole or in part, by the statute of limitations.
28

THIRD DEFENSE

Plaintiff's claims for breach of any contract are barred, in whole or in part, by plaintiff's failure to mitigate its alleged damages.

FOURTH DEFENSE

Plaintiff's claims for rescission are barred by the doctrines of laches, waiver and estoppel.

FIFTH DEFENSE

Plaintiff's claims for rescission are barred by plaintiff's partial performance of its obligations under the 2005 Refund Agreement.

SIXTH DEFENSE

Plaintiff's claims for breach of any contract are barred by the defense of failure of consideration.

SEVENTH DEFENSE

Plaintiff's claims for breach of any contract are barred by the defense of frustration of purpose.

EIGHTH DEFENSE

Plaintiff's claims for damages are barred, in whole or in part, by Home Depot's right to set-off or recoupment of Plaintiff's outstanding debts to Home Depot.

NINTH DEFENSE

Home Depot reserves the right to add any other defenses in accordance with the Federal Rules of Civil Procedure.

RELiance ON JURY DEMAND

Home Depot hereby asserts its reliance on Plaintiff's demand for a jury trial on all issues and claims eligible for jury determination in this action.

PRAYER FOR RELIEF

WHEREFORE, Home Depot respectfully prays for judgment as follows:

- 1 1. that judgment be entered in favor of Home Depot and against B&O on all claims
- 2 for relief;
- 3 2. that B&O take nothing by its Complaint;
- 4 3. that Home Depot be awarded its attorneys' fees and costs of suit incurred herein;
- 5 and
- 6 4. that Home Depot be awarded such other and further relief as it deems just and
- 7 proper.

8 **HOME DEPOT U.S.A., INC.'S COUNTERCLAIMS**
9 **AGAINST B&O MANUFACTURING, INC.**

10
11 Pursuant to Fed. R. Civ. P. 13, Defendant Home Depot U.S.A., Inc. ("Home Depot")
12 brings these Counterclaims against Plaintiff B&O Manufacturing, Inc. ("B&O") for breach of
13 two separate contracts between the parties. Home Depot seeks to recover its damages, pre-
14 judgment interest, expenses and attorneys' fees, as well as any other appropriate relief, and states
15 as follows:

16 **THE PARTIES**

17 1. Defendant and Counterclaim-Plaintiff Home Depot U.S.A., Inc. is a Delaware
18 corporation with its principal place of business in Atlanta, Georgia.

19 2. Upon information and belief, Plaintiff and Counterclaim-Defendant B&O
20 Manufacturing, Inc. is a California corporation, with its principal place of business in San
21 Francisco, California. Upon information and belief, B&O is manufacturer and distributor of
22 steel products. B&O has supplied Home Depot with safety netting systems for its stores. In
23 2007, Home Depot terminated the parties' relationship with respect to Home Depot stores in the
24 United States in accordance with the termination provision of the parties' underlying contract.
25 B&O, however, continues to supply other Home Depot entities with safety netting systems for
26 Home Depot stores outside the United States.

27 **VENUE AND JURISDICTION**

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13

HOME DEPOT U.S.A., INC.'S ANSWER TO PLAINTIFF'S THIRD AMENDED COMPLAINT

3. Home Depot and B&O are citizens of different states, and the amount in controversy exceeds \$75,000. Accordingly, this Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1332.

4. This Court has personal jurisdiction over both parties.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(1) because Counterclaim-Defendant B&O resides in this District.

NATURE OF THE ACTION

6. Home Depot has purchased safety netting systems for its home improvement warehouse stores from B&O for several years. In 2005, Home Depot pre-paid B&O for nearly \$7 million in product. After accepting Home Depot's money, however, B&O was unable to fulfill its end of the bargain by delivering all the product Home Depot had ordered. By the end of 2005, B&O had failed to deliver approximately \$1.8 million in safety netting systems that Home Depot had already ordered and for which it had already paid.

7. When Home Depot raised this shortfall with B&O, Michael Calleja, B&O's president, Mr. Calleja informed Home Depot's representatives that B&O (1) did not have \$1.8 million in product available to supply to Home Depot, and (2) could not refund Home Depot its money, despite the fact that Home Depot prepaid that money to B&O. Although Home Depot attempted to work with B&O to resolve this matter, B&O remained unable to deliver the missing product or refund Home Depot its money.

8. In January 2006, Home Depot sought and ultimately received B&O's agreement to refund the \$1.8 million balance to Home Depot (the "Refund Agreement"). Rather than insisting that B&O return all this money at once, Home Depot agreed to allow B&O to pay Home Depot over time by effectively refunding a percentage of the money Home Depot was paying B&O to fulfill subsequent orders. By agreeing to the payment plan specified in the Refund Agreement, Home Depot sought to recover its money without causing B&O unnecessary financial hardship or cash flow problems. Mr. Calleja agreed to this arrangement and memorialized it on B&O's own letterhead in late-January, 2006. Mr. Calleja signed and presented the Refund Agreement to Home Depot on or about January 31, 2006.

9. Although B&O made its first three payments to Home Depot, B&O never made any further payments as the Refund Agreement required. As a result, B&O continues to owe Home Depot approximately \$1.2 million for product that Home Depot paid for in 2005 and B&O has never delivered. And although Home Depot has repeatedly offered to work with B&O to resolve this matter with either (a) delivered safety netting systems or (b) a refund of Home Depot's money, B&O has not provided Home Depot with either its money or its product.

10. Accordingly, Home Depot brings this action to recover \$1.2 million from B&O. In addition to recovering these funds, Home Depot seeks to recover interest, its expenses and its attorneys' fees from B&O.

FACTUAL BACKGROUND

11. Home Depot operates warehouse stores throughout the United States. In those stores, Home Depot displays and stores merchandise on large warehouse racking systems. For many years now, Home Depot has installed safety netting systems on the higher shelves to prevent merchandise from falling and potentially injuring Home Depot's customers and the associates working in the stores.

12. B&O has supplied Home Depot with these safety netting systems. Although B&O was once a valued supplier of Home Depot, the parties' relationship has deteriorated in more recent years.

1 13. B&O filed a lawsuit against Home Depot in 2004 when Home Depot selected
2 another vendor to supply safety netting systems for a number of new Home Depot stores. Later
3 that same year, B&O threatened to sue Home Depot for patent infringement because it had
4 purchased safety netting systems from another vendor.

5 **THE 2005 MEMORANDUM OF UNDERSTANDING**

6 14. In late 2004, Home Depot attempted to resolve its differences with B&O. The
7 parties agreed to release all claims against each other and enter into a new agreement. Home
8 Depot agreed to award B&O a significant amount of business and issued B&O a purchase order
9 (No. 9000522338) for 12,000 safety netting systems in December 2004.

10 15. The parties formalized their agreement in April 2005 by signing a Memorandum
11 of Understanding (the MOU). Paragraph 1.a of the MOU commits Home Depot to issue
12 purchase orders for 72,000 safety netting systems once B&O confirmed that it would be able to
13 deliver the products to Home Depot. Because B&O was experiencing cash flow difficulties and
14 represented that it needed funds to manufacture the required number of netting systems, Home
15 Depot further agreed to pre-pay for these safety netting systems before B&O delivered the first
16 12,000 units that Home Depot ordered the previous December. A complete copy of the MOU
17 and its exhibits (with any pricing information redacted) is attached hereto as Counterclaims
18 Exhibit 1.

19 16. In June 2005, Home Depot issued a second purchase order (No. 9001007483) for
20 nearly 65,000 safety netting systems. In combination with the 12,000 units Home Depot
21 ordered in December, 2004, this order satisfied the MOU's requirement that Home Depot order
22 at least 72,000 safety netting systems from B&O.

23 17. In accordance with the MOU, Home Depot issued and B&O cashed two checks to
24 pre-pay B&O nearly \$7 million for these safety netting systems.

25 18. After accepting Home Depot's pre-payment, however, B&O was unable to satisfy
26 Home Depot's purchase orders. In addition to the December 2004 and June 2005 purchase
27 orders submitted by Home Depot, the MOU required B&O to supply Home Depot with at least
28

1 50 percent of its safety netting systems for new and remodeled Home Depot stores. *See* MOU ¶
 2 1.b. Accordingly, Home Depot continued to purchase additional systems throughout 2005 and
 3 2006.

4 19. Despite its prior representations that it could meet Home Depot's demand for the
 5 safety netting systems, B&O had difficulty satisfying Home Depot's orders. Although B&O
 6 delivered a substantial number of safety netting systems in 2005, B&O failed to deliver
 7 approximately \$1.8 million in product for which Home Depot had pre-paid.

8 20. When Home Depot asked B&O about this shortfall, Mr. Calleja informed Home
 9 Depot's representative that B&O did not have sufficient product on hand to fulfill Home Depot's
 10 outstanding order. In addition, Mr. Calleja informed Home Depot's representative that B&O
 11 could not return Home Depot's money.

12 21. Over the following weeks and months, Home Depot tried to work with B&O to
 13 reach a fair resolution to this problem. At no time during these negotiations did B&O deny that
 14 Home Depot had prepaid the funds at issue or claim that B&O had any excuse for failing to
 15 deliver the product to Home Depot. Finally, in January 2006, Home Depot informed B&O that
 16 Home Depot could no longer simply leave the matter unaddressed.

17 **THE REFUND AGREEMENT**

18 22. On or about January 31, 2006, Mr. Calleja met with David Curley, then Home
 19 Depot's Procurement Manager at the Home Depot Store Support Center in Atlanta, Georgia.
 20 The purpose of the meeting was to discuss and negotiate a resolution related to the \$1.8 million
 21 that Home Depot prepaid to B&O. Mr. Curley and Mr. Calleja agreed to a plan in which B&O
 22 would make quarterly payments to Home Depot until the whole \$1.8 million was repaid. Home
 23 Depot did not ask B&O to pay interest on the \$1.8 million. Mr. Curley asked Mr. Calleja to
 24 prepare a written document that would confirm B&O's outstanding debt to Home Depot and set
 25 forth the agreed-upon schedule for B&O to repay that debt over time. Mr. Calleja agreed that he
 26 would provide Home Depot with such a document.

23. At no time during the January 31, 2006 meeting did Mr. Calleja deny B&O's obligation or outstanding debt to Home Depot. Nor did Mr. Calleja request that Home Depot give him more time to prepare the agreement or to consult with other parties.

24. Later that day, Mr. Calleja presented Home Depot's representative with an Open Balance Refund Agreement ("Refund Agreement"), which he had already signed. In the Refund Agreement, B&O explicitly acknowledged Home Depot's pre-payment for the December 2004 and June 2005 purchase orders and committed to repay the outstanding balance to Home Depot. A true and correct copy of the Refund Agreement as executed by Home Depot is attached hereto as Counterclaims Exhibit 2.

25. From May to November 2006, B&O paid Home Depot \$564,935 in refund payments under the Refund Agreement. After making those initial refunds, however, B&O stopped all payments under the Refund Agreement.

26. Home Depot made further attempts to recover the outstanding debt from B&O, to no avail. Finally, on May 30, 2007, Home Depot demanded that B&O either deliver the additional product that Home Depot had paid for or refund Home Depot's money.

27. B&O responded by filing suit against Home Depot in this Court on June 7, 2007. Since that time, B&O has not refunded the \$1.2 million balance that it owes to Home Depot. Nor has B&O resolved this matter by delivering the product Home Depot ordered and paid for so long ago.

COUNT I

(Breach of the Memorandum of Understanding)

28. Home Depot reincorporates the allegations of the preceding paragraphs as if set forth herein.

29. The parties entered into the 2005 Memorandum of Understanding, which is a valid contract.

30. Home Depot pre-paid B&O nearly \$7 million for safety netting systems that were to be delivered pursuant to the contract.

31. B&O has breached the 2005 MOU by failing to deliver \$1.8 million in product for which Home Depot pre-paid B&O in 2005.

32. As a direct and proximate result of B&O's breach of contract, Home Depot has been injured in an amount to be proved at trial.

33. In addition, Paragraph 15.2 of the Expense Buying Agreement attached as Exhibit C to the 2005 MOU (*see* Counterclaims Exhibit 1) provides that Home Depot shall be entitled to recover the costs of enforcing the agreement any the terms of any purchase orders from B&O:

15.2 All reasonable costs and expenses incurred by Home Depot due to the Supplier's violations of or failure to follow any or all of the terms of the Order will be charged to the Supplier. The Supplier expressly agrees to reimburse Home Depot for all such costs and expenses and the Supplier further agrees that, at Home Depot's option, Home Depot may deduct such costs and expenses from any sum then or thereafter owing to the Supplier by Home Depot.

34. As a direct result of B&O's conduct in this matter, Home Depot has been forced to incur expenses, including significant attorneys' fees, to enforce the terms of the 2005 MOU and its December 2004 and June 2005 purchase orders in connection with this Counterclaim, and to defend B&O's claims that Home Depot breached the 2005 MOU. In addition, Home Depot will continue to incur such costs and attorneys' fees to further enforce its rights in this action.

35. Accordingly, Home Depot seeks an award of damages to compensate Home Depot for the damages, interest, attorneys' fees and other expenses it has suffered in this matter.

COUNT II

(Breach of the Open Balance Refund Agreement)

36. Home Depot reincorporates the allegations of the preceding paragraphs as if set forth herein.

37. The parties entered into the Refund Agreement, which is a valid and binding contract.

38. After partially performing, B&O breached the Refund Agreement by refusing to make further scheduled refund payments to Home Depot.

39. As a direct and proximate result of B&O's breach of contract, Home Depot has been injured the amount of \$1.2 million, which represents the unpaid balance of funds that B&O has failed to repay to Home Depot.

40. Accordingly, Home Depot seeks an award of damages in the amount of \$1.2 million plus any legal interest that has accrued since the time of B&O's breach in accordance with O.C.G.A. § 13-6-13.

COUNT III

(For Attorneys' Fees Pursuant to O.C.G.A. § 13-6-11)

41. Home Depot reincorporates the allegations of the preceding paragraphs as if set forth herein.

42. Over the course of several years, Home Depot has repeatedly tried to amicably resolve the parties' differences over B&O's inability or unwillingness to (a) deliver the product that Home Depot paid for in 2005 or (b) refund Home Depot the balance of Home Depot's pre-payments.

43. Rather than honor its obligations under the parties' agreements as detailed above, B&O elected to halt its refund payments to Home Depot and to file suit against Home Depot in this Court.

44. B&O, therefore, has acted in bad faith and been stubbornly litigious. In addition, B&O has caused Home Depot unnecessary trouble and expense.

45. As a direct and proximate result of B&O's conduct in this matter, Home Depot has been forced to incur significant expenses of litigation, including but not limited to attorneys' fees and expenses.

46. Home Depot, therefore, seeks to recover these fees and expenses of litigation from B&O pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Home Depot respectfully prays for judgment as follows:

- 1 A. That Plaintiff recover nothing on its Complaint;
- 2 B. That the Court award Home Depot damages for B&O's breach of contract in an
- 3 amount to be determined at trial;
- 4 C. That the Court award Home Depot pre-judgment interest pursuant to O.C.G.A.
- 5 § 13-6-13; and
- 6 D. That the Court award Home Depot its costs of bringing this action, including its
- 7 reasonable attorneys' fees, pursuant to the parties' agreements and O.C.G.A. § 13-6-11;
- 8 E. That this Court award Home Depot such other and further relief as may be just
- 9 and proper.

10 DATED: April 14, 2008

BONDURANT, MIXSON & ELMORE LLP

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12 By: /s/ Christopher T. Giovinazzo

13 Christopher T. Giovinazzo

14 Ronan P. Doherty

15 Attorneys for Defendant

16 HOME DEPOT U.S.A., INC.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2008 I have electronically filed the within and foregoing
DEFENDANT HOME DEPOT U.S.A., INC.'S ANSWER, DEFENSES AND
COUNTERCLAIMS TO PLAINTIFF'S THIRD AMENDED COMPLAINT with the Clerk
of Court using the CM/ECF system which will automatically send email notification of such
filing to the following attorney of record, and by U.S. mail, postage prepaid thereon, addressed
as follows:

Paul E. Rice
Rice & Bronitsky
350 Cambridge Ave., Suite 225
Palo Alto, California 943006

/s/Christopher T. Giovinazzo
Christopher T. Giovinazzo